

STATE OF MICHIGAN
COURT OF APPEALS

C. T. CHARLTON & ASSOCIATES, INC.,

Plaintiff/Counterdefendant-
Appellee,

v

TOYO SEAT USA CORPORATION,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

November 25, 2003

Nos. 240689; 241630

Oakland Circuit Court

LC No. 2001-036387-CK

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Toyo Seat USA Corporation (“Toyo”) appeals from the trial court’s confirmation of an arbitration award. On appeal, Toyo asserts that the arbitration award at issue as well as the trial court’s confirmation order should be vacated to the extent damages are awarded to CT Charlton & Associates (“CTC”). Toyo asserts that under contract and agency theories it should not be held liable to CTC; that the arbitrator erred when he awarded damages including future commissions, penalties, and attorney fees to CTC; and finally that the arbitrator exceeded his authority by modifying the award at the close of the proceedings. After reviewing the record, and applying the appropriate standard of review in this arbitration case, we find that the arbitrator exceeded his power only in the manner he structured CTC’s future damages. None of Toyo’s remaining claims warrant relief. We affirm in part, vacate in part, and remand.

In 1992, the parties agreed that CTC would serve as Toyo’s agent. CTC agreed to use its “best efforts” to locate purchasers for Toyo’s products in return for commissions on sales. Years later, after Toyo terminated the contract, the parties disputed how much, if any, commissions Toyo owed to CTC. Toyo alleged that CTC had breached its contractual duties, as well as its fiduciary duties by competing with Toyo. The case went to arbitration, and the arbitrator concluded Toyo was liable to CTC for previously earned commissions in the amount of \$3,236,294, and \$6,964,290 in future damages. The arbitrator noted that this figure had to be reduced to present day value. The arbitrator also concluded that CTC had not breached its fiduciary duties to Toyo, but was liable to Toyo for breaching its contractual obligation to exercise best efforts and calculated damages at \$3,950,000, a figure including future damages reduced to present value. The arbitrator also awarded CTC a statutory penalty in the amount of \$100,000, as set forth in MCL 600.2961(5), and attorney fees of \$157,124.75, costs of \$273.47, and \$1,864 in transcription costs. CTC sought circuit court confirmation of the award. Toyo

sought confirmation of its damage award and vacatur of CTC's award. On cross-motions, the court confirmed the arbitration award. It is from this order that Toyo now appeals.

The standard of review applicable to arbitration awards is limited. MCR 3.602(J) and (K); *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). When reviewing an award, a circuit court may only: (1) confirm the award; (2) vacate the award if it was obtained through fraud, duress or other undue means; or (3) modify or correct errors which are apparent on the face of the award. *Konal, supra*. To merit either modification or vacation, the arbitrator must have displayed a manifest disregard for the applicable law but for which the award would have been substantially different. *Krist v Krist*, 246 Mich App 59, 69; 631 NW2d 53 (2001). A party must show that an arbitrator was led to a wrong conclusion through an error of law, and that, but for that error, a substantially different award would have been made before the award will be set aside. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). The error of law must be so material or substantial that it governed the award. *Id.* The error of law must be clear on the face of the award or in the reasons for decision. The factual findings of the arbitrator are not subject to judicial review. *Krist, supra* at 67, 69.

On appeal, Toyo argues that the arbitrator erred in concluding that CTC breached the loyalty provision in the contract, but not concluding that the breach precludes CTC from its suit for commissions. Similarly, Toyo argues that because the arbitrator concluded that CTC breached the "best efforts" provision of the contract, it necessarily should have found that CTC breached its fiduciary duty to Toyo. Moreover, Toyo argues that because the arbitrator should have found that CTC breached its fiduciary duty, it should have concluded CTC was not entitled to compensation.

In this case, the arbitrator's reasoning underlying his conclusions is not presented. Again, our ability to review an arbitration award is limited "to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Detroit Automobile Inter-Ins Exchange v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). We are also cognizant that an arbitration award is enforceable even if it grants relief that "could not or would not be granted by a court of law or equity in an ordinary civil action." MCL 600.5025; see MCR 3.602(J)(1). In its proffered arguments, Toyo requests that we "try to discern the arbitrator's 'mental path leading to the award,'" which is prohibited under the applicable standard of review. *Krist, supra* at 67. After a thorough review, we find no error of law on the face of the award regarding the arbitrator's findings relating to CTC's duties under the Sales Representative Agreement.

Turning to the issue of damages, Toyo presents two arguments supporting its assertions that the arbitrator exceeded his powers by awarding future damages. First, Toyo argues that the arbitrator erred as a matter of law by reducing the damages to present value when the unambiguous provisions of the agreement require commissions to be paid out as they are earned. And second, that by calculating damages and reducing them to present value, the arbitrator was speculating regarding what commissions would be earned.

The arbitrator's remedial authority is limited to the contractual agreement of the parties. *Ehresman v Bultynk & Co, PC*, 203 Mich App 350, 355; 511 NW2d 724 (1994). Hence we will review the applicable contract provisions. Section 11 of the Sales Representative Agreement states as follows in relevant part:

Continuance of Commission

In the event of termination, PRINCIPAL shall continue to pay AGENT regular commissions as if this Agreement had not been terminated, on all shipments of the PRODUCTS made by PRINCIPAL on orders obtained by AGENT, or on inquiries received or programs developed during AGENT's tenure that become orders.

Further, Section 8 of the Sales Representative Agreement states:

Terms

AGENT's earned commission shall be payable to AGENT at his office on or before the Fifteenth (15th) day subsequent to receipt of payment by PRINCIPAL from the customer.

A plain reading of the pertinent contract provisions reveals that the agreement between the parties contemplated that, even in the event that the agreement was terminated, commissions would still be paid as they had before termination. While Toyo was obligated to pay CTC commissions as orders are placed and when payment from the customer is accepted by Toyo, it was the arbitrator's interpretation as evidenced by his award that a present value determination was required. The arbitrator was not empowered to use such discretion because his action is in direct contravention of both Section 8 and Section 11 of the Sales Representative Agreement. The arbitrator's future damage award including the reduction to present value affects both the timing of the payment and the determination of the amount of payment. Due to the structure of the payment of damages and the speculative nature of the award, we find that the calculation of damages was in error.

Although Toyo has demonstrated the arbitrator's determination of future damages was error, this finding has no bearing on CTC's entitlement to future damages. We note that the contract specifically contemplates the payment of future commissions. Toyo is obligated to pay CTC commissions; however, both the amount of commissions and the timing of payment must be determined and paid in accordance with the contract. Thus, we vacate the portion of the trial court's order that affirms the arbitrator's award of future damages. We also remand the case to the trial court for further action consistent with this opinion including resubmission to the arbitrator for a proper determination of commissions due since the arbitration award, and the development of a schedule for determination of future commissions in accordance with section 8, the payment clause, as an implementation of section 7, the commission clause.¹

¹ Section 7 of the Sales Representative Agreement states as follows:

Commission

Unless otherwise specifically negotiated, PRINCIPAL shall pay AGENT as compensation for AGENTS' services a commission as follows:

(continued...)

Toyo also takes issue with the arbitrator's assessment of a penalty against it for intentionally failing to pay commissions owed. MCL 600.2961(5) states:

A principal who fails to comply with this section is liable to the sale representative for both of the following:

(a) Actual damages caused by the failure to pay the commission when due.

(b) If the principal is found to have intentionally failed to pay the commission when due, and amount equal to 2 times the amount of commissions due but not paid as required by this section, or \$100,000.00, whichever is less.

Our Supreme Court has read that provision to mean that “if a principal deliberately fails to pay a commission when due, it is liable for [the penalty] under the statute, even if the principal did not believe, reasonably or otherwise, that the commission was owed.” *In re Certified Question*, 468 Mich 109, 114; 659 NW2d 597 (2003). There is no other requirement such as bad faith. *Id.* at 110-111. The arbitrator determined that Toyo failed to pay commissions when they became due. In fashioning a remedy, the arbitrator also determined that “Toyo willfully failed to pay commissions due to [CTC].” Accordingly the arbitrator determined that Toyo was liable for the full amount of the penalty. We find no error associated with the award of the statutory penalty for willfully failing to pay commissions owed.

In a similar vein, Toyo takes issue with the arbitrator's conclusion that the attorney fees were payable under MCL 600.2961(6)² which provides, “if a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs.” Toyo first repeats its earlier arguments that it should not be held liable to CTC, and thus, CTC should not be the prevailing party. Again, we decline to adopt Toyo's reasoning. Toyo also argues that CTC should not be considered the prevailing party because the arbitrator determined that CTC was liable to Toyo on Toyo's counterclaim for breach of contract. This Court addressed and rejected this argument in *Peters v Gunnell Inc*, 253

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Two Percent (2.0%) (2.5% General Seating) of the “net billing” invoiced by PRINCIPAL on existing business and orders obtained by AGENT and accepted by PRINCIPAL. Agent agrees to adjust commission percentage, where deemed necessary, in order to positively effect total cost toward the effort to acquire certain business. The “net billing” shall be the gross billing to the Customer, less all discounts and allowances, tool charges, freight and sales tax, if any. PRINCIPAL may deduct from subsequent commissions payable to AGENT any commission paid AGENT with respect to PRODUCTS which the Customer has returned for credit and upon which PRINCIPAL has properly issued such a credit to the Customer.

² The arbitrator ruled that attorney fees were also payable under Rule 45 of the American Arbitration Association's Commercial Arbitration Rules. However, because we rule that the arbitrator did not err as a matter of law, we need not address this issue on appeal.

Mich App 211, 224-225; 655 NW2d 582 (2002). Toyo's challenge of the attorney fee award fails.

We need not reach Toyo's final argument regarding the arbitrator's modification of the future damage award as it has become moot based on our resolution of the future damage issue.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio